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No. _____

In The

Supreme Court of the United States

October Term, 1997

WILLIAM JACKSON,

Petitioner,

versus

CSX TRANSPORTATION, INC.
and DOUG CORCORAN,

Respondents.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is a state court permitted to order an additur to a jury verdict in a FELA suit?

LIST OF PARTIES

The petitioner before this Court is William Jackson. Jackson was an employee of CSX Transportation, Inc. at the time of his accident.

The respondents before this Court are CSX Transportation, Inc., a rail carrier covered by the Federal Employer Liability Act.

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PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

Petitioner, William Jackson, respectfully prays that a writ of certiorari issue to the Louisiana Supreme Court to review the judgment and opinion of the Louisiana Fourth Circuit Court of Appeals, entered in the above-captioned proceeding on December 23, 1997. The Louisiana Fourth Circuit then rendered a *per curiam* opinion on rehearing on January 15, 1998. Petitioner applied to the Louisiana Supreme Court for a writ of certiorari to the Louisiana Fourth Circuit, which was denied on April 3, 1998.

CITATIONS OF OPINIONS BELOW

The opinion of the Louisiana Fourth Circuit Court of Appeals is not yet published, but is available through Westlaw at 1997 WL 790463, and is reprinted in the appendix hereto, at p. 1a, *infra*. The Fourth Circuit's *per curiam* opinion and the Louisiana Supreme Court's denial of petitioner's application for writ of certiorari are not published or available through Westlaw, but are reprinted in the appendix hereto.

CONCISE STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(3) to review a decision, involving a constitutional right, by the highest court in Louisiana rendered on April 3, 1998. A petition for rehearing was not filed.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VII. Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

FEDERAL STATUTORY PROVISIONS

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,

machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

On June 1, 1994, Jackson filed this FELA suit seeking general damages as well as past and future loss of earning capacity. In his petition, Jackson alleged, *inter alia*, that CSX failed to provide adequate lighting in the area of its yard where the accident occurred. As a result of the inadequate lighting, Jackson inadvertently stepped into the "container block housing"[1] of a flat car, lost his balance and fell backwards, injuring his knee and rupturing a disc in his neck. Jackson underwent neck surgery on his ruptured disc and lost significant past earnings as well as future earning capacity. Under a "best case" scenario, Jackson's surgeon expected that Jackson would have a ten to fifteen percent permanent impairment. Jackson is permanently restricted from activities which would require

[1] This is a hole built into the floor of a flat car to accommodate the wheels of tractor-trailer trucks being transported on the flat car.

him to lift, push, or pull greater than fifty pounds, or repeatedly hyper extend or flex his neck. At the time of trial, Jackson had reached the maximum improvement anticipated by his doctor.

Less than one year after the accident, Jackson began to seek reemployment. He did not go back to the railroad because his medical restrictions would not permit him to be a switchman, and he could not become an engineer without first rising through the ranks from switchman status. Instead, Jackson has held a series of jobs as he attempted to better his position, within the confines of his medical restraints. In January 1995, Jackson began driving for New Orleans Tours, where he continues to work to this date. His initial pay was $6/hour during a two week training period. He then earned $7/hour for a six month probationary period. As of the time of trial, Jackson was earning $8.50/hour. In 1995, Jackson made $20,995.67.

By comparison, Jackson's peer at CSX, Oscar James, who began in the same class as Jackson and had been promoted to locomotive engineer by 1995, earned $41,489 that same year.[2]

Moreover, in 1995, James was drawing only 85% of full engineer salary. At the time of trial, James was making 90% of full wages, or $125.69/day. Presumably, by

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[2] Jackson started with four other recruits at CSX. Of the two employees who have stayed, both have become engineers – 100% of those who were able to continue employment.

1997, James was earning 95% of full engineer salary, and by 1998, he should be at full 100% engineer salary.[3]

After a five-day trial, the jury found that CSX had been negligent and rendered a verdict, ostensibly in favor of Jackson, but assessing total damages at only $62,000.00, and assigning Jackson 70% comparative negligence. The trial court entered a judgment on that verdict awarding Jackson $18,600.00. Neither the verdict nor the judgment specifically stated whether this amount included any award for lost wages or simply covered general damages.

At a post-trial hearing, the trial judge revealed that he was biased against Jackson due to the fact that Jackson had not accepted a settlement offer from CSX. Knowing that his judgment (and denial of post-trial motions) would be appealed by Jackson, he noted on the record, "for purposes of a reviewing court that significant sums of money were offered to settle this case". He openly admitted that the total award of $62,000 was inadequate for an operated surgical disc, and even cited Louisiana Supreme Court jurisprudence to that effect. Nevertheless, because of Jackson's settlement refusal, the trial judge defied that authority and told Jackson, "You have to get it corrected above." He then reminded Jackson that he had forewarned Jackson to settle the case, admonishing, "I told you gentlemen after the last settlement offer if it was

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[3] CSX started its employees at 75% of the position's regular salary, and increased that rate by 5% increments each year on an employee's anniversary date. CSX stipulated at trial that 100% pay for a switchman in 1993 was $113/day. Thus, Jackson's daily rate of $84.75 was 75% of that amount.

within the framework I was not going to touch it. ***You live by the sword you die by the sword.*** At this point, even though I think it should have been settled at that figure, ***I am indeed frustrated by it.*** I felt the settlement offer was appropriate under the circumstances. It should have been taken, and I told you I was not going to touch it after that. I throw up my hands. I now throw up my hands and say, guys, good luck to both of you. I wish you the best. I can't touch you."

Petitioner appealed, requesting a new trial, on several grounds, including the abusively low damages award. On appeal, the Fourth Circuit acknowledged that the general damages award was abusively low, and set about correcting it *de novo*, without giving Jackson his constitutional right to a new trial by a jury. The appellate court rendered an opinion which initially stated that it would "amend the trial court judgment to award Jackson $150,000, the lowest possible award a reasonable fact finder could have awarded for the injury he received." However, at the end of the opinion, the appellate court stated, "we find that $125,000 is the lowest reasonable award for Jackson's injury. Accordingly, we amend the judgment to award Jackson $125,000 in general damages, to be reduced by his 70 percent comparative negligence." Petitioner requested a rehearing from the Fourth Circuit on several grounds, and particularly noting the inconsistency of the general damages award. The Fourth Circuit rendered a *per curium* opinion which set the general damages award at $125,000, reduced by 70 percent.

Petitioner then sought a writ of certiorari from the Louisiana Supreme Court to the Louisiana Fourth Circuit, again requesting a new trial. That petition was denied on

April 3, 1998. Petitioners now seek a writ of certiorari from this Court to the Louisiana Supreme Court, to review the decisions of the Louisiana courts in this case and to order a new trial.

REASON FOR GRANTING WRIT

I. The Louisiana appellate court's additur instead of ordering a new trial violates Jackson's constitutional right under the Seventh Amendment as well as under the FELA to a jury trial, and conflicts with this Court's decisions forbidding additur.

Recently, this Court held that an appellate court violated employee's Seventh Amendment right to jury trial in a Title VII and Civil Rights suit by requiring the district court to enter judgment for an amount less than that determined by jury, without allowing plaintiff option of new trial. *Hetzel v. Prince William County*, ___ U.S. ___, 118 S.Ct. 1210, 140 L.Ed.2d 336 (1998). In the FELA context, this Court has also held that "the right to trial by jury is too substantial a part of the rights accorded by the [FELA] to permit it to be classified as a mere 'local rule of procedure'. *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 363, 72 S.Ct. 312, 315, 96 L.Ed. 398 (1952). Accordingly, state appellate courts must use the standards of review applicable in the federal court system, remanding a case for a new trial after finding that the verdict is abusively low. They absolutely may not substitute their own judgment for that of the jury and render their own damage awards. Although the Louisiana state constitution allows appellate review of the facts, Louisiana appellate courts are not

permitted to perform a *de novo* review of the facts in a FELA case and render a judgment based on the record, because this procedure is not permitted in the federal system. 45 U.S.C. § 51 *et seq.*; United States Constitution, Seventh Amendment. However, this is precisely what the Louisiana appellate courts did in the instant case, instead of vacating the judgment and remanding the case for a new trial after finding reversible error.

The Louisiana Fourth Circuit Court of Appeal agreed with the restriction on *de novo* review, but *only* as it pertains to *legal* errors which might taint the fact-finding process. Regarding factual errors, the Fourth Circuit claimed that it was free to amend the judgment as it saw fit, stating:

> Although the federal jurisprudence applicable to FELA cases prohibits this court from performing a de novo review following a finding that legal error so tainted the fact-finding process as to require reversal, **the court is not prohibited by FELA from amending the judgment because of a factual error.** Thus, if we find manifest error in the quantum assigned, we may apply Louisiana law to determine if the jury clearly abused its "much discretion" in setting the quantum.

The Louisiana courts' position that it is free to make factual findings in this FELA case cannot be reconciled with the Seventh Amendment and federal jurisprudence holding otherwise. This Honorable Court should grant writs to correct the Louisiana courts' erroneous interpretation of FELA rights under the Seventh Amendment.

Moreover, Louisiana's unique system of appellate review and amendment of damage awards is completely at odds with the federally-guaranteed right to jury trial under the FELA. In Louisiana, *inadequate awards may be increased by the appellate court de novo,* but only to the ***lowest*** reasonable amount a jury could have awarded. This Court has held that "the right to trial by jury is too substantial a part of the rights accorded by the [FELA] to permit it to be classified as a mere 'local rule of procedure'. *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 363, 72 S.Ct. 312, 315, 96 L.Ed. 398 (1952). Thus, Louisiana's practice of capping a plaintiff's award on appeal to the amount which the appellate court perceives is the "lowest reasonable amount" a jury could have awarded, further offends the Seventh Amendment right to a jury trial. A FELA plaintiff is entitled to a jury determination of his damages, not an appellate court's perception of the least amount that a jury could have awarded!

Having found that the damage award was inadequate to compensate Jackson for his operated ruptured disc, the Louisiana Fourth Circuit Court of Appeal was bound under FELA and the Seventh Amendment to vacate the judgment and remand the suit for a new trial. Similarly, the Louisiana Supreme Court should have granted writs to vacate the judgment and remand for new trial. Likewise, at the post-trial hearing where the trial judge candidly admitted that the jury verdict was inadequate, he should have granted Jackson's request for a new trial instead of sending the case up to the Fourth Circuit for correction. Because of the unique nature of the right to a jury trial under FELA, which is jeopardized by

the Louisiana practice of review, this Court should grant writs to remand this case for a new trial.

CONCLUSION

In conclusion, the Louisiana appellate courts have flaunted this Court's jurisprudence by trampling Petitioner's right to a jury trial as guaranteed by the Seventh Amendment and the FELA statute. This Court has long held that an additur is not tolerated under the federal system. It should also not be tolerated in the state courts where federal rights are being determined, as in a FELA case. Therefore, this Court should grant a writ to review the Louisiana courts' decisions, vacate the additur and original judgment, and remand the case for a new trial.

Respectfully submitted,

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APPENDIX

William JACKSON

v.

CSX TRANSPORTATION, INC. and Doug Corcoran.

No. 97-CA-0109.

Court of Appeal of Louisiana,
Fourth Circuit.

Dec. 23, 1997.

Before PLOTKIN, JONES and CIACCIO, JJ.

PLOTKIN, Judge.

Plaintiff William Jackson appeals a trial court judgment awarding him $18,600 against defendant CSX Transportation, Inc. for injuries he allegedly received when he stepped into an uncovered hole on a flat railroad car during the course and scope of his employment as a switchman with CSX. The judgment represents a jury verdict awarding Jackson $62,000, reduced by 70 percent comparative negligence. CSX answered the appeal seeking modification of the judgment to award interest on court costs only from the date the amount of costs were fixed and taxed, rather than the date of the judgment. CSX also seeks the costs incurred in this court.

We amend the trial court judgment to award Jackson $150,000, the lowest possible award a reasonable fact-finder could have awarded for the injury he received. We affirm the jury's finding that Jackson was 70 percent comparatively negligent in causing his own injuries, making Jackson's total award $45,000. We further amend the judgment to award interest on court costs only from the

date of the judgment fixing those costs. In all other respects, we affirm the trial court judgment.

Facts

Jackson allegedly suffered injuries to his leg and neck at approximately 2:15 a.m. on June 9, 1993, when he fell during the course and scope of his employment with CSX after stepping into an uncovered container housing hole on a tote car in the CSX train yard in Gentilly. A tote car is a flat car used for transporting tractor/trailers with wheels; the wheels fit into the container block housing holes. Jackson claims that the holes should to be covered when not in use; however, the hole which he stepped into was not covered. Jackson's primary claim against CSX is that inadequate lighting in the section of the train yard where the accident occurred was the primary cause of his accident.

Prior to trial, Jackson's suit against Doug Corcoran, his supervisor, was dismissed. The case preceded to trial by jury. Following a three-day trial, the jury returned a verdict in favor of Jackson for $62,000, but found that Jackson was 70 percent comparatively negligent for causing his own injuries. Post-trial, Jackson filed a motion for new trial, a motion for judgment notwithstanding the verdict, and a motion for additur. The trial judge denied those motions.

During a conference on the post-trial motions, the trial judge made some strong statements relative to his belief that CSX made fair settlement offers and that Jackson should have accepted the settlement offers. On appeal, Jackson's primary argument is rooted in his claim

that the trial judge exhibited a "predisposition" against him derived from his failure to accept the settlement offers, which predisposition so tainted the jury verdict that the case should be reversed and remanded for new trial.

Specifically, Jackson claims that the trial court committed the following errors:

1. Allowing prejudicial and irrelevant voir dire of his vocational evaluation expert witness in front of the jury, rather than requiring that the voir dire be conducted outside the jury's presence.

2. Giving repetitive jury instructions which understated the duty owed by the railroad and unduly emphasized comparative negligence principles.

3. Allowing CSX's vocational rehab counselor to testify concerning hearsay material not contained in his expert report, resulting in surprise to the plaintiff.

4. Allowing CSX to introduce fabricated self-serving letters which purportedly offered rehab and/or employment to Jackson.

Jackson also claims that the jury award of $62,000 was abusively low considering the fact that he suffered a ruptured cervical disc which required surgery, and the fact that he lost both past wages and future earning capacity.

In answering Jackson's appeal, CSX argues that the trial court improperly awarded the plaintiff interest on court costs from the date of judgment, rather than from

the date the amount of costs were ascertained. CSX also seeks the costs of the appeal.

I. Alleged legal errors

Because Jackson's case falls under the Federal Employers' Liability Act ("FELA"), a federally-created right, when an appellate court finds that legal errors tainted the fact-finding process, the right to trial by jury applies and the case must be remanded for retrial; this court is not allowed to perform a de novo review under that scenario. See Dice v. Akron C. & Y.R. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); Croce v. Bromley Corp., 623 F.2d 1084 (5th Cir.1980), cert. denied, 450 U.S. 981, 101 S.Ct. 1516, 67 L.Ed.2d 816 (1981). Thus, we will first consider the alleged legal errors.

Jackson's overreaching argument on appeal is rooted in his claim that the trial judge's comments during the conference held after the filing of the post-trial motions revealed his prejudice against Jackson for failing to accept fair settlement offers and insisting on trying the case. That prejudice influenced the entire trial, especially as outlined above, Jackson claims, entitling him to reversal and remand.

On this general issue, CSX notes that the plaintiff failed to file a motion to recuse the trial judge and in fact failed to even move for a mistrial during the proceedings. The trial judge's comments in the post-trial conference are insufficient, CSX says, to overcome the presumption that a trial judge is impartial.

At the post-trial conference, the trial judge stated, in pertinent part, as follows:

> Since this Motion for New Trial crossed my desk[,] I have thought about the issue of whether the jury verdict is subject to adjustment on the basis of a judgment notwithstanding the verdict or that the Court should grant a new trial or grant an additur. I wish to note for purposes of a reviewing court that significant sums of money were offered to settle this case, the jury ultimately coming down with a verdict of $62,000 in damages and finding the plaintiff seventy percent at fault for his own injuries.
>
> From my own perspective insofar as the nature of the injuries that the plaintiff suffered, I find that for an operated surgical disc, that under the circumstances, the total award of $62,000 is inadequate. Under the case of Anderson v. New Orleans Public Service, decided by the Louisiana Supreme Court dealing with judgments notwithstanding the verdict, when there is a misstake [sic] in the jury interrogatory form committed by the jury where they have not reached a reasonable amount, materially, manifestly, that reasonable minds could differ I am supposed to grant a judgment notwithstanding the verdict reviewing the entire judgment.
>
> However, I do not embrace the quantum of lost specials in this matter that the plaintiff tried to put forth. I view this matter as – that the injuries to Mr. Jackson's neck as being worth a significant sum of money, and he also suffered injury to his leg. I find that there is a permanent impairment of some nature to his whole body as a result of this injury, but under the circumstances of this case, his past lost wage claim and

his future lost wage claim, loss of earning capacity, do not reach anywhere near the level as claimed by the plaintiff in closing arguments, and I specifically reject the evaluations and sums given by Melville Wolfeson [sic] under those circumstances. However, given the circumstances of the liability issue I find that the jury was also – I disagree with the jury and I find that Mr. Jackson was more responsible for his own injury than seventy percent, and I would place it closer to ninety percent.

Based upon same, of the totality of this thing, I decline to touch the verdict in any way, shape or form on the quantum. I leave that to an Appellate Court. Accordingly, the motions are denied, but I do agree it meets the test of Anderson. You have to get it corrected above.

* * *

I told you gentleman [sic] after the last settlement offer if it was within the framework I was not going to touch it. You live by the sword[,] you die by the sword. At this point, even though I think it should have been settled at that figure, I am indeed frustrated by it. I felt the settlement offer was appropriate under the circumstances. It should have been taken, and I told you I was not going to touch it after that. I throw up my hands. I now throw up my hands and say, guys, good luck to both of you. I wish you the best. I can't touch you.

* * *

Under Louisiana law – I would not have found what they found, but the quantum backs down to that figure. It may actually be a little less.

(Emphasis added.)

Generally, a trial judge is presumed to be impartial; thus, a party contending that a judge did not act impartially is required to present some factual basis to support his claim and may not rely on conclusory allegations. Pierce v. Charity Hospital of Louisiana, 550 So.2d 211, 213 (La.App. 4th Cir.), writ denied, 551 So.2d 1341 (La.1989). Adverse rulings alone are insufficient. Earles v. Ahlstedt, 591 So.2d 741 (La.App. 1st Cir.1991).

Trial judges must always act professionally. The declared public beliefs of a judge affect the quality of judging in our legal system. When a trial judge believes that a fundamental or substantial error which produced an injustice occurred in the trial, he should correct that error in post-trial practice, if possible, rather than making statements, then telling the parties to seek relief in a higher court. A trial judge acts inappropriately and unprofessionally when he acknowledges an error in the judicial process, then requires the parties to appeal for correction of the patent error, when he has the authority and the opportunity to correct the error at the trial court level.

Obviously, the trial judge's comments in the instant case reflecting his displeasure at Jackson's lawyer for failing to settle were intemperate and unrestrained; however, our review of the record reveals no evidence that the trial judge's feelings on that issue affected his behavior at trial. Nothing in the trial court record indicates that the trial judge displayed any particular prejudice against Jackson or in favor of CSX. The trial in this matter was not particularly competitive; both parties simply presented their evidence and reserved their objections for serious matters. The trial judge ruled against CSX as

often as he ruled against Jackson on various objections and other issues which arose during the course of the trial. Thus, we find no merit in Jackson's arguments on this issue.

We note however that the trial judge's attitude toward Jackson's attorney's refusal to settle the case for "an appropriate sum" did apparently influence his rulings on the post-trial motions for new trial, judgment notwithstanding the verdict, and additur. In point of fact, the trial judge stated his belief that the $62,000 quantum was abusively low under the circumstances of the case. As the discussion below indicates, the manifest error in the quantum assigned by the jury in this case is obvious by simple reference to settled Louisiana jurisprudential rules in cases involving plaintiffs with similar injuries. Nevertheless, the trial judge refused to fulfill his duty to correct the judgment on post-trial motions, deferring instead to this court. The trial judge has a duty to modify the jury's findings if he finds grounds for doing so, regardless of his feelings or opinions concerning the actions of the parties pre-trial.

The trial judge's stated reason for refusing to modify the judgment was that he disagreed with the jury's assigning only 70 percent of the liability for the accident to Jackson. He indicated that he would have assigned at least 90 percent of the liability for the accident to Jackson, and that the final award reached by raising the quantum, then raising the comparative negligence, would have been nearly the same as that reached by the jury. However, the defendant never requested that Jackson's comparative negligence be increased either before the trial judge in the post-trial motions, or before this court on

appeal; thus, the trial judge's reasons for denying the post-trial motions were fallacious.

A. Voir dire of Jackson's vocational evaluation expert witness

In his first specific assignment of error, Jackson claims that the trial judge improperly allowed CSX to argue that his vocational evaluation expert witness, Bobby Roberts, was not qualified, resulting in the planting of a "seed of doubt" in the minds of the jurors concerning the reliability of the expert's testimony. CSX should have raised the issue of the witness' [sic] qualifications in a motion in limine, Jackson claims. Otherwise, the trial judge should have excluded the jury during CSX's questioning concerning his qualifications, Jackson claims.

CSX answers this argument by pointing out that Jackson's counsel himself opened the door to questioning concerning the witness's [sic] qualifications. Moreover, Jackson failed to file a motion requesting that the jury be excused during the questioning of the witness. Thus, Jackson has waived his right to complain about the voir dire of the expert witness, CSX claims.

We find no merit in Jackson's arguments on this issue. The record reveals that Jackson's attorney originally asked Mr. Roberts to explain the differences between a vocational evaluation specialist and a vocational rehabilitation counselor, and to explain the differences in the duties of a vocational evaluation specialist and the duties of a vocational rehabilitation counselor. Thereafter, CSX's attorney asked Mr. Roberts questions

concerning a declaratory judgment suit filed by the Louisiana Board for the licensing of professional vocational counselors based on a complaint that Mr. Roberts had acted outside his area of expertise.

The defendant is entitled to traverse the plaintiff's expert's qualifications. Given the fact that Jackson's attorney opened the door to discussion of the issue of Mr. Roberts' qualifications, the trial judge's decision to allow CSX to ask questions on that issue was not so prejudicial as to rise to the level of reversible error.

B. Repetitive jury instructions

In his second specific assignment of error, Jackson claims that the jury instructions given by the trial judge improperly overstated the duty owed by the railroad, while unduly emphasizing comparative negligence. According to Jackson, the trial judge improperly refused to instruct the jury concerning whether CSX could have used a safer method, and improperly accepted CSX's jury instruction that the railroad was not liable unless it should have anticipated that Jackson would choose an unsafe method of mounting the tote car. The instructions concerning unsafe methods were confusing, in light of the fact that his entire case was based on his claim that CSX failed to use proper illumination, Jackson argues.

Moreover, Jackson lists 19 different "repetitive" jury charges taken from CSX's requested jury charges. Because the trial judge placed so much emphasis on circumstances that would relieve CSX from liability, the jury forgot the basic instruction "that the defendant owed Jackson a nondelegable duty to exercise reasonable care and to provide

him with a safe place to work," the result of which diluted his federally-created claim, Jackson says.

CSX answers this assignment of error by citing general law concerning review of jury instructions as a whole to determine claims of prejudice. Taken as a whole, the trial judge's instructions were "eminently correct" under FELA jurisprudence, CSX claims. Moreover, the "charges as a whole fairly apprised the jury of the elements of plaintiff's cause of action in negligence under FELA without any favoritism to the defendant railroad," CSX claims.

When reviewing jury instructions, an appellate court is under a mandate to consider the jury instructions as a whole when trying to determine whether those instructions were so incorrect or deficient as to constitute reversible error. Brown v. White, 405 So.2d 555, 558 (La.App. 4th Cir.1981), aff'd, 430 So.2d 16 (La.1982). Moreover, an appellate court may not reverse a verdict on the basis of incorrect or deficient jury charges unless the charge, as a whole, is so incorrect or inadequate as to preclude the jury from reaching a verdict based on the law and the facts. Anderson v. Fowler Trucking, Inc., 506 So.2d 1319, 1324-25 (La.App. 2d Cir.), writ denied, 512 So.2d 434 (La.1987).

In the instant case, Jackson does not claim that the jury charges were incorrect, only that they were prejudicially repetitive. Our review of the record indicates that the charges were in fact correct. Moreover, we agree with Jackson that, on balance, the law charges contained substantially more information explaining what is not covered by CSX's non-delegable duty than what is covered.

On the other hand, a trial judge has a duty to give a law charge which is balanced to the claims of both parties. However, the obligation to give a law charge and the amount of information relative to the claims of each party explained by the law charge depends, in large part, on the complexity of the law governing the particular controversy. This case was brought under the provisions of FELA; unquestionably, the trial judge properly stated the defendant's duty owed to the plaintiff. However, the explanation of the full law governing the controversy required that the trial judge give greater detail in his instructions regarding the responsibilities which do not fall under a defendant employee's non-delegable duty to provide a safe work place than the instructions to define the duty itself.

The trial judge's instructions in the instant case properly explained the entirety of the applicable law. The balance of the instructions was influenced, not so much by repetitiveness, as claimed by the plaintiff, as by the obligation to state the entire law. We find that, under the circumstances presented by this case, the jury charges were not overbalanced in favor of CSX. The court could perhaps have better explained CSX's non-delegable duty to provide Jackson with a safe working place; however, the duty itself was properly stated. Certainly, when read together in conjunction with the evidence and argument, as required by the law, the jury charges are not so prejudicial as to constitute reversible error.

Moreover, the jury obviously understood the instructions given the fact that it found that CSX was liable for Jackson's injuries, despite its obvious belief that Jackson himself was in the best position to prevent those injuries.

On the jury interrogatory form, the jury found that CSX was negligent with respect to Jackson's accident and that that negligence was a legal cause of the accident. Despite the trial judge's statements concerning the ways in which CSX could avoid liability, the jury obviously understood that CSX had a non-delegable duty to provide a safe work place. Thus, we find no merit in Jackson's arguments on this issue.

C. Testimony of CSX's vocational rehabilitation counselor

By his third specific assignment of error, Jackson claims that the trial judge improperly allowed CSX's vocational rehabilitation counselor to testify beyond the scope of the report produced by CSX in response to Jackson's discovery requests. Specifically, Jackson claims that his case was essentially "ambushed" because the expert was allowed to testify about hearsay material concerning his conversations with potential employers about the job market, which conversations occurred just days prior to the trial in this case.

In answering this argument, CSX claims that the trial court properly allowed its vocational rehabilitation expert to testify concerning CSX's rehabilitation program and concerning the results of his own labor market survey of available jobs which were appropriate for Jackson. That testimony was part and parcel of his qualifications as a vocational rehabilitation expert, CSX says. Jackson's claim that he was "surprised" by the testimony is without merit, CSX claims, because the pre-trial order did not

limit the testimony of any witness, and the witness was listed on the pre-trial order.

One of Jackson's primary contentions in this case was that his earnings since the accident had been limited by the physical restrictions imposed by his doctor. CSX was entitled to traverse Jackson's testimony on that issue and attempt to prove that other higher-paying jobs within Jackson's limitations were available. Jackson's arguments on this issue have no merit. The fact that the vocational rehabilitation counselor conducted the survey just prior to the trial in an effort to produce the most up-to-date evidence possible is not grounds for objection. The trial court's decision to admit the evidence was not erroneous under the circumstances presented by this case. We find no merit in Jackson's arguments on this issue.

Moreover, the testimony presented by CSX did not "ambush" the plaintiff's case because it was neither unexpected or irrelevant. Jackson made a claim for past and future wage losses; CSX simply presented what it considered the best evidence to contradict that claim. The fact that other jobs within Jackson's limitations were available in the community, as well as the fact that CSX offered Jackson rehabilitation and employment were proper subjects for the presentation of testimony. The trial judge properly exercised his duty to control the flow of evidence on the issues before it.

D. Admission of CSX letters

By his fourth specific assignment of error, Jackson claims that the trial judge improperly allowed CSX to introduce letters allegedly written to him by medical

officers of CSX, which letters purported to offer Jackson vocational rehabilitation, despite the fact the medical officers who wrote the letters were not present to testify and thus could not be cross examined. Moreover, according to Jackson, CSX offered letters which were not produced prior to trial, which letters purported to offer employment opportunities to Jackson. Moreover, the trial judge refused his request to offer his letters written in rebuttal to the letters; his letters were proffered.

On the other hand, CSX claims that the letters were admitted on cross-examination in response to Jackson's testimony that he did not recall whether CSX offered him vocational rehabilitation. Moreover, CSX rebuts Jackson's claim that the "self-serving" letters were "fabricated" by CSX, arguing that most of the letters pre-date the filing of Jackson's suit.

The record in the instant case is replete with evidence that CSX made several attempts to provide rehabilitation to Jackson and in fact tried to help Jackson return to his job, or to train for a different job with the company. Even Jackson's wife said that she was aware of those efforts. Nevertheless, Jackson originally testified that he could not recall whether CSX had offered him rehabilitation or an opportunity to return to work. Thereafter, on cross-examination, Jackson admitted that he failed to respond to those efforts on the advice of his attorney. CSX had the right to offer evidence to rebut Jackson's previous implication that he had not been offered rehabilitation or employment. Under the circumstances, we find no reversible error in the trial court's actions on this issue.

The same reasoning applies to the trial court's denial of Jackson's request to admit the letters written by his attorney in response to CSX's offers of rehabilitation and employment. Jackson admitted on the stand that he failed to take advantage of those offers on the advise [sic] of his attorney; the letters simply explained the attorney's reasons for advising Jackson to refuse the offers. Any error in the trial court's denial of the request to admit the letters was harmless.

II. Quantum

Although the federal jurisprudence applicable to FELA cases prohibits this court from performing a de novo review following a finding that legal error so tainted the fact-finding process as to require reversal, the court is not prohibited by FELA from amending the judgment because of a factual error. Thus, if we find manifest error in the quantum assigned, we may apply Louisiana law to determine if the jury clearly abused its "much discretion" in setting the quantum. Youn v. Maritime Overseas Corp., 623 So.2d 1257, 1261 (La.1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379, (1994). If we find an abuse of discretion, we may then, under Louisiana law, raise or lower the award to the lowest or highest amount that could have been awarded by a reasonable fact finder. Id.

Jackson makes two primary arguments concerning the inadequacy of the $62,000 jury award: (1) that the total award was insufficient to compensate him for a ruptured disc injury which required surgery, and (2) that

he was not awarded damages for loss [sic] past and future wages.

A. Minimum total award

Concerning the first argument, Jackson points inter alia to this court's opinion in Redondo v. Consolidated Freightways Corp., 529 So.2d 1296 (La.App. 4th Cir.), writ denied, 533 So.2d 363 (La.1988), in which the court held that $100,000 is the minimum award for a ruptured lumbar disc requiring surgery. In that case, this court found that "a general damage award of $100,000 is the low range for a herniated lumbar disc resulting in a laminectomy after conservative treatment." Id., 529 So.2d at 1300. In so finding, the court indicated that any award less than $100,000 for injuries such as those suffered by the plaintiff in this case is abusively low.

In the instant case, Dr. Vogel initially diagnosed a cervical strain and attempted to treat Jackson conservatively. However, when Jackson failed to improve, Dr. Vogel ordered a myelogram/CTscan which revealed several bulging and herniated discs. The most serious problem, according to Dr. Vogel, was at C6-7, which had almost completely effaced and the disc had moved into the canal where the nerve root travels, resulting in what is commonly called a "pinched nerve." To correct the problem, Dr. Vogel performed an anterior cervical fusion, after which Jackson was hospitalized for more than two days. Dr. Vogel assigned a 10 to 20 percent permanent partial total body medical impairment and restricted Jackson from lifting, pushing, or pulling more than 50 pounds or repeatedly hyperextending or flexing his neck.

As the trial judge noted in his comments at the post-trial conference, the $62,000 indeed was a clear abuse of the trial court's "much discretion" in light of this court's previous decision concerning the minimum general damages to be awarded by a plaintiff sustaining the same type of injury sustained by Jackson. Thus, the trial court improperly denied the post-trial motions on the quantum issue.

Moreover, we find that the $100,000 award set by this court ten years ago as the lowest reasonable general damage award for a plaintiff who suffered a serious spinal injury which required surgery is no longer adequate. Considering inflation, we find that $125,000 is the lowest reasonable award for Jackson's injury. Accordingly, we amend the judgment to award Jackson $125,000 in general damages, to be reduced by his 70 percent comparative negligence.

Lost past and future wages

Concerning the second argument, Jackson cites the testimony of his expert witness that he will suffer $431,156 in loss of future earning [sic], which was based on the assumption that, if the accident had not occurred, Jackson would have become a CSX engineer. Jackson claims that the jury improperly failed to award damages for that amount based on the testimony of his expert.

In answering this argument, CSX focuses on the jury's finding that Jackson was 70 [sic] comparatively negligent in causing his own accident, pointing to the fact that Jackson was provided a lantern and had been trained in

the safe method to mount tote cars, and quoting testimony that the area was adequately illuminated at the time of the accident. CSX also claims that the verdict is not abusively low, pointing to conflicting testimony. CSX claims that the credibility of both Jackson and his treating physicians was suspect. Accordingly, the jury may have concluded that the neck injury was not caused by the accident, CSX implies. Moreover, CSX claims that the effects of the injuries on Jackson were relatively low. Finally, according to CSX, Jackson did not suffer lost future wages because he could be earning as much as he would have earned by becoming an engineer at the railroad, if he so chose.

Our review of the record reveals that the issue of past and future lost wages was strongly contested by the two parties and that much of the evidence presented was directed toward that issue. While Jackson himself claimed that he was limited by his injury and his economic expert calculated lost earning capacity at more than $400,000, the jury also heard testimony that Jackson could return to work for the railroad as an engineer, earning more than he was earning prior to the accident. Moreover, the jury heard Jackson's testimony that he has minimal effects from the injury. Finally, CSX's vocational rehabilitation expert testified concerning several jobs available to Jackson for which he could receive pay commensurate with what he was earning at the railroad. Jackson testified that he liked his job; the record evidence is sufficient to support a jury finding that Jackson's limited income since the accident and in the future was a matter of his own choosing rather than a consequence of the accident. Thus, we find no clear abuse of the jury's "much discretion" in

failing to award Jackson damages for lost past or future wages.

2. CSX's answer to appeal

In its answer to Jackson's appeal, CSX claims that the interest on court costs should begin on the date the costs are ascertained, not on the date the judgment was signed. In support of this argument, CSX cites jurisprudence holding that prejudgment interest is not recoverable in FELA cases.

In Louisiana, interest on an award of court costs begins to run on the date of the judgment fixing the costs. Cajun Electric v. Owens-Corning Fiberglass, 616 So.2d 645, 647 (La.1993). Thus, we amend the judgment to award interest on court costs only from the date of the judgment fixing those costs.

CSX also seeks the costs of defending the instant appeal. However, since we have amended the award to increase Jackson's general damages to $125,000, CSX is not entitled to recover the costs of this appeal.

Conclusion

Accordingly, the trial court judgment is amended to award Jackson $125,000, reduced by his 70 percent comparative negligence, and to award interest on court costs only from the date of the judgment fixing those costs. In all other respects, the trial court judgment is affirmed.

AMENDED; AFFIRMED.

CIACCIO, J., concurs in the result.

CIACCIO, Judge, concurring.

I agree that the damage award was inadequate and should be raised to $125,000.

However, I do not agree that the trial judge abused his discretion in denying the post-trial motions because his evaluation of plaintiff's claim did not justify an additiur [sic].

With regard to the trial court's comments on the settlement discussions, I find them to be a statement of an obvious fact: a plaintiff who declines a settlement offer takes the risk of an adverse jury verdict.

WILLIAM JACKSON	*	NO. 97-CA-0109
VERSUS	*	COURT OF APPEAL
CSX TRANSPORTATION, INC. AND DOUG CORCORAN	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

* * *

ON REHEARING

* * *

PER CURIAM

We grant rehearing for the sole purpose of correcting technical errors and calculations of the amended award to the plaintiff. Plaintiff William Jackson is awarded $125,000, reduced by his 70 percent comparative negligence, to $37,500.

THE SUPREME COURT OF THE STATE OF LOUISIANA

WILLIAM JACKSON

VS. NO. 98-C-0417

CSX TRANSPORTATION, INC.
AND DOUG CORCORAN

IN RE: Jackson, William; – Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Orleans Civil District Court Div. "L" Number 94-08589; to the Court of Appeal, Fourth Circuit, Number 97-CA-0109

April 3, 1998

Denied

BJJ

PFC

WFM

CDK

JPV

CDT

JTK

LEMMON, J. not on panel

Supreme Court, U.S.
FILED
AUG 7 1998
OFFICE OF THE CLERK

No. 98-59

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

WILLIAM JACKSON,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
and DOUG CORCORAN,
Respondents.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent, CSX Transportation, Inc., disagrees with Petitioner's statement of the questions presented for review. The questions presented for consideration are:

1. Did petitioner, William Jackson, timely and properly raise a federal question in the state court proceedings?

2. Assuming petitioner raised the question properly, does the Seventh Amendment or any other federal requirement affect a Louisiana state appellate court's right to apply state procedures of appellate review to increase a jury damage award in a suit under the Federal Employers' Liability Act ("FELA")?

LIST OF INTERESTED PERSONS AND RULE 29.6 NOTATION

The parties to the proceedings below were William Jackson (petitioner-plaintiff), CSX Transportation, Inc., and Doug Corcoran (defendants). Before trial, Jackson voluntarily dismissed Corcoran as a defendant, and he is no longer a party to the case.

Under this Court's Rule 29.6, CSX Transportation, Inc. (defendant-respondent) certifies that it is owned by its parent company, CSX Corporation. Its nonwholly owned subsidiaries include the following publicly owned companies: Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Rail Road Extension Company, The Central Railroad Company of South Carolina, The Cincinnati Inter-Terminal & Valley Railroad Company, Dayton and Michigan Railroad Company, and The Home Avenue Railroad Company.

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IN THE

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No. 98-59

WILLIAM JACKSON,

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and DOUG CORCORAN,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Supreme Court

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, CSX Transportation, Inc., respectfully asks this Court to deny William Jackson's petition for a writ of certiorari. In this FELA case tried in Louisiana state court, Jackson argues that the Seventh Amendment prohibits a state appellate court from increasing the jury's damage award under state appellate procedure and that the court must instead follow federal procedure and remand the case for a new trial. Jackson has no ground for certiorari review for at least two reasons.

First, because Jackson failed to raise his asserted constitutional question timely and properly in the courts below, this Court should not even consider the merits of his application. Instead of raising this Seventh Amendment issue at the first opportunity after the verdict in the district court, Jackson asked the trial judge to set aside the jury's damage award and enter an increased amount

de novo as an independent trier of fact under Louisiana procedural law. Thereafter, on appeal, though citing the Seventh Amendment and seeking a new trial, Jackson alternatively asked the state intermediate appellate court to set aside the jury's verdict of comparative fault and to reallocate the percentages of fault without remanding the case. After the court of appeal increased the damage award, Jackson asked for a further increase on rehearing as an alternative to a new trial. Thus, he deliberately sought relief in the lower courts according to Louisiana's procedures of review of jury verdicts and advocated positions directly contrary to the arguments he now raises in this Court based on the Seventh Amendment. Under principles of waiver and estoppel, as well as the pleading requirements for constitutional issues, this Court should summarily deny Jackson's application because he has failed to preserve a federal question for this Court's review.

Second, even assuming Jackson had properly raised the issue in the courts below, the Louisiana appellate court did not violate the Seventh Amendment by increasing the jury's verdict on appeal in this case. This Court has long held that the Seventh Amendment does not apply to FELA cases tried in state court. Although federal substantive law applies, state appellate procedures govern the case, and the right of review in an appellate court is purely a matter of state concern. Louisiana's procedures of appellate review of jury damage awards do not affect the substantive law of the FELA. No compelling reason exists for granting certiorari in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to U.S. Const. amendment VII and 45 U.S.C. § 51 of the FELA, both set forth at pages 2-3 of Jackson's writ petition, the applicable Louisiana statutes concerning state procedures of appellate review are La. Const. art. 5, § 10(B) and La. Code Civ. P. art. 2164:

La. Const. art. 5, § 10(B). Scope of Review.

> Except as limited to questions of law by this constitution, or as provided by law in the review of administrative agency determinations, appellate jurisdiction of a court of appeal extends to law and facts.

La. Code Civ. P. art. 2164:

> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

STATEMENT OF THE CASE

William Jackson injured himself while working as a switchman in CSX's rail yard, when he mounted a flatcar and stepped into a functional opening known as a "container housing" in its floor. He filed a petition for damages in Louisiana state court in Orleans Parish against CSX and his supervisor, Doug Corcoran. After voluntarily dismissing Corcoran as a defendant, Jackson proceeded to a five-day jury trial against CSX on his claim under the FELA. He asserted that CSX had negligently failed to provide him with a safe place to work, adequate fixed lighting, and an adequate hand-held lantern or other "safety equipment." The overwhelming evidence conflicted with Jackson's version of the accident and readily established that he was largely if not totally at fault.

The jury returned a verdict finding that the negligence of both CSX and Jackson had legally caused the accident. It apportioned 70% of the fault to Jackson and 30% to CSX, and assessed $62,000 as lump-sum damages. Based on the jury's verdict, the district court signed a judgment on the same day awarding Jackson the sum of $18,600, all costs of the proceedings, and interest on the principal judgment and costs from date of judgment until paid.

The trial judge thereafter denied Jackson's alternative motions for judgment notwithstanding the verdict, new trial, and additur.

On Jackson's appeal, the Louisiana Fourth Circuit Court of Appeal, the state's intermediate appellate court, affirmed the jury's apportionment of 70% fault to Jackson. The court of appeal noted the jury's "obvious belief that Jackson himself was in the best position to prevent [his] injuries" and rejected Jackson's arguments asserting prejudicial evidentiary rulings and the trial judge's alleged bias against him. Nevertheless, the panel concluded that the jury had abused its discretion in awarding $62,000 in lump sum damages. Applying Louisiana's procedures for reviewing jury damage awards, the appellate court increased Jackson's damage award to $125,000, reduced by his 70% comparative negligence, upon finding that $125,000 represented the lowest reasonable general damage award for any plaintiff who sustains a disc injury requiring surgery. The Fourth Circuit recognized, however, Jackson's "minimal effects from the injury" and concluded that the record evidence supported a jury finding "that Jackson's limited income since the accident and in the future was a matter of his own choosing rather than a consequence of the accident." The court of appeal further amended the judgment to award interest on costs only from the date of judgment fixing those costs. In all other respects, it denied Jackson's assignments of error and affirmed the district court's judgment. In a subsequent *per curiam* opinion, the Court of Appeal granted rehearing solely to clarify that Jackson's net recovery after reduction for his comparative negligence was $37,500.

Both Jackson and CSX applied for writs of certiorari in the Louisiana Supreme Court, seeking review of the Fourth Circuit's decision. In its application, CSX asked the state's highest court to reinstate the jury's award and opposed Jackson's request for a new trial on damages. The Louisiana Supreme Court denied both writ applications. Jackson has now petitioned this Honorable Court

for a writ of certiorari, asserting that the Seventh Amendment entitles him to a new trial.

REASONS FOR DENYING THE WRIT

I. PETITIONER FAILED TO RAISE A FEDERAL QUESTION PROPERLY AND TIMELY IN THE STATE COURT PROCEEDINGS

This Court has long held that it cannot consider an alleged federal question unless the party presenting it has timely and properly raised and pursued it at the appropriate point or points in the state court proceedings. *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). Likewise, under Louisiana jurisprudence, appellate courts will not consider a constitutional question on appeal unless it was raised by pleadings in the court below. *Stovall v. City of Monroe*, 199 La. 195, 5 So. 2d 547, 552 (1941). Furthermore, this Court's Rule 14.1(g)(i) requires a petitioner seeking certiorari review of a state court judgment to specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised. . . ." The petitioner must show that the federal question was timely and properly raised by specifying the method or manner of raising the question, as well as the way that the state courts passed on it, and must quote or summarize specific portions of the record where the matter appears. *Id.*

The statement of the case in Jackson's writ application does not specify how or when he raised in the Louisiana trial or appellate courts his asserted constitutional issue based on the Seventh Amendment. Moreover, a simple reading of the Louisiana Fourth Circuit Court of Appeal's opinion reveals that the state courts never meaningfully addressed or ruled on the question. The short excerpt from the appellate court's opinion that Jackson cites on page 8 of his writ application is pure dictum that only briefly alludes to federal jurisprudence concerning appellate re-

view in FELA cases. In that cryptic reference, the state appellate court did not pass on an issue of constitutional dimension. The Louisiana Supreme Court summarily denied Jackson's writ application without any opinion at all. As the record readily shows, Jackson failed to timely and properly raise a constitutional issue for this Court to resolve.

After the verdict and judgment in this case, Jackson filed a motion for judgment notwithstanding the verdict in the Louisiana district court and alternatively moved for a new trial or additur in lieu of granting a new trial. In that pleading, Jackson raised no issue concerning the Seventh Amendment. To the contrary, he specifically asked the Louisiana trial judge to set aside the jury's damage award and to enter an increased award *de novo* as an independent trier of fact under the Louisiana state procedure for granting a judgment n.o.v. At pages 19-20 and 38-39 of his memorandum in support of his post-judgment motions, Jackson likewise referred to Louisiana's procedures of appellate review of jury awards and made no mention of any Seventh Amendment limitation on either the state's district or appellate courts:

> The federal and state standard are the same. That is, whether reasonable men could not arrive at a contrary verdict. Once the trial court concludes that a JNOV is warranted because reasonable men could not differ on the fact that the award here was abusively low, it must then determine what is the proper amount of damages to be awarded. In making this determination, the trial judge is not constrained as the [Louisiana] Courts of Appeal are of raising the award to the lowest point which is reasonably within the discretion afforded that court. The trial court is able to render a *de novo* award based on the trial court's independent assessment of the injuries and damages. The trial judge is in a better position to make a damage assessment than is an appellate court. The trial court hears the testimony, views the evidence and is able to evaluate the credibility

> of the witnesses. Once the jury verdict is set aside under the JNOV standards, the trial court is then the trier of fact. It should not be limited by the same constraints placed upon an appellate court reviewing a damage award. *Anderson v. New Orleans Public Service,* 583 So.2d 829 (La. 1991).
>
> * * * *
>
> In the event that this Court were an appellate court and could only raise the general damages to the minimum allowed by law, that minimum would be somewhere in neighborhood of $125,000.00 to $140,000.00. The highest general damage awards seem to be in the $400,000.00 to $440,000.00.
>
> However, as stated earlier, in accordance with *Anderson v. New Orleans Public Service, supra,* this Court is not an appellate court and is free to render a general damage award *de novo.* Given the lowest range is $125,000.00 and the highest is $440,000.00, this Court could render a verdict in accordance with the law and amply supported by the record of a general damage award of $282,500.00, the midpoint between $125,000.00 and $440,000.00. However, plaintiff prays that a general damage award be made of $275,000.00.

Although Jackson alternatively moved for a new trial or an additur, he informed the trial court at page 41 of his memorandum "that the proper relief in this matter requires the granting of a JNOV and that a fair and reasonable award be made to William Jackson." He expressed his "preference that the JNOV be granted" and did not argue that the Seventh Amendment entitled him to another jury trial on either liability or damages. *Id.*

Thereafter, at page 7 of his appellate brief to the Louisiana Fourth Circuit Court of Appeal, the state's intermediate appellate court, Jackson asserted for the first time that the Seventh Amendment required a remand for a new trial in this FELA case. That argument was flatly contrary to his prior recognition of Louisiana's appellate

procedures of review in his post-judgment memorandum and his request in the district court that the trial judge enter a *de novo* verdict as an independent trier of fact under Louisiana procedure, without the need for a new jury trial. Furthermore, Jackson selectively argued the Seventh Amendment issue in the court of appeal. Although he sought a new trial on damages, in a supplement to his appellate brief, he specifically asked the court of appeal alternatively to set aside the jury's appointment of fault between the parties and reassess fault against CSX without a remand for a new trial on that issue.

> To the extent that the Court [of Appeal] does not remand it for a new trial but agrees there was error, plaintiff submits that the jury abused its discretion and that this Honorable Court should reallocate that 70% to CSX.

Even in his application for rehearing after the court of appeal increased the damage award from $62,000 to $125,000, though citing the Seventh Amendment and asking for a remand for a new trial, Jackson alternatively requested at pages 1 and 6 of his application that the appellate court amend and increase the damage award even further.

Unhappy with the amount of the appellate court's increase of his damages and its affirmance of the apportionment of fault and liability, Jackson later urged Seventh Amendment arguments on applying for certiorari in the Louisiana Supreme Court and in this Court. He now contends that he has a constitutional right to a new jury trial and that the state court of appeal was forbidden from amending the damage award.

The record shows that Jackson failed to raise his Seventh Amendment issue timely and properly in the district court and made arguments both in the trial court and the court of appeal that are totally inconsistent with the position that he now urges in his writ application. Based on

principles of waiver and judicial estoppel, as well as Louisiana state procedures and the requirements under settled Supreme Court jurisprudence for pleading constitutional issues, this Court should summarily deny the petition for lack of jurisdiction without even addressing the merits of Jackson's arguments.

II. LOUISIANA'S PROCEDURES OF APPELLATE REVIEW OF JURY DAMAGE AWARDS IN FELA CASES TRIED IN ITS STATE COURTS DO NOT VIOLATE THE SEVENTH AMENDMENT

Even assuming Jackson had timely and properly raised a constitutional question below, his argument has no merit. Appellate review of the verdict and judgment in the Louisiana court system did not infringe upon the Seventh Amendment or the substantive federal law applicable to his FELA claim. There is no reason to grant certiorari to review a ruling that is fully consistent with Supreme Court jurisprudence on these issues.

Jackson bases his entire writ application on the false premise that he has a constitutional right to a jury trial in the Louisiana state court where he elected to bring his FELA claim. But as this Honorable Court has clearly held in an FELA case, the Seventh Amendment does not apply to the states.

In *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916), a death action brought under the Federal Employers' Liability Act in a Minnesota state court, the Supreme Court of Minnesota affirmed a less-than-unanimous jury verdict in favor of the plaintiff according to a Minnesota statute. The defendant argued that he had a right to a unanimous verdict under the Seventh Amendment, as was required in the federal courts. This Court held that no such right existed because the Bill of Rights is not concerned with state action, but deals only with federal actions. 241 U.S. at 217. As a necessary corollary,

> the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same.

Id. See also Georgia v. McCollum, 505 U.S. 42, 52 (1992) (citing *Bombolis* for the rule that "[s]tates do not have a constitutional obligation to provide a jury trial in civil cases"). This Court held that the right to trial by jury is not a fundamental aspect of due process or liberty protected by the Fourteenth Amendment and that the Seventh Amendment is not applicable to state court proceedings.

The petitioner in *Bombolis* further argued that its rights under the FELA were of a federal character, and as the Seventh Amendment is controlling upon Congress, its provisions must also apply to rights granted by Congress. 241 U.S. at 219-20. This Court rejected these arguments, because Congress was certainly aware of the well-settled rule that the Seventh Amendment is inapplicable to the states. Because these principles were so "completely and conclusively" settled, this Court reasoned that in enacting the FELA Congress:

> clearly contemplate[d] the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts.

Id. at 218. This Court noted in *Bombolis* that the plaintiff's arguments would "distort and destroy" the Constitution and would create "confusion" that would obscure the fact that the Seventh Amendment applies only to tribunals of the United States. *Id.* at 219-20. To hold otherwise would mean that the courts of the states would be considered as state or federal courts from day to day depending upon the subject matter of the controversy under consideration. *Id.* at 220-21. On the contrary, the

states are empowered to protect and enforce rights created under either system according to their own state procedures. *Id.* at 221-22. As the Fifth Circuit has more recently reaffirmed in the context of a Jones Act suit, "the argument that a federal right has an appurtenant Seventh Amendment guarantee applicable to state court proceedings was rejected long ago by the Supreme Court." *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1491 (5th Cir.), *cert. denied*, 506 U.S. 975 (1992).

As in the *Bombolis* case, Jackson's writ application rests upon a "grave misconception of the very fundamentals of our constitutional system of government." 241 U.S. at 219. There is no constitutional right to a jury trial in an FELA action brought in state court.

Citing *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359 (1952), Jackson contends that state appellate courts must use federal procedures of review in FELA cases and that Louisiana's practice of raising inadequate jury awards to the lowest reasonable amount on appeal instead of remanding the case for a new trial "offends" the Seventh Amendment. The *Dice* decision lends no support whatsoever to his unfounded arguments. In *Dice*, a petitioner seeking damages under the FELA alleged that his railroad employer was negligent and that a purported prior release of his claim was void because of fraud. In setting aside the jury's damage verdict, the Ohio state court applied Ohio law that singled out the fraudulent release issues for determination by the judge under Ohio substantive law rather than by the jury under federal law. In reversing the decision, this Court held that federal law, not state law, controlled the validity of the release and that the Ohio courts had erred in taking away the verdict when the issue of fraud had been submitted to the jury. Ohio's selective treatment of the fraudulent release claim for decision by the judge in that manner did not comport with the purposes of the FELA. This

Court remarked that "the Bombolis case might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act." 342 U.S. at 363.

The Supreme Court in *Dice* did not hold that the FELA guarantees the right to a jury trial in state courts in accordance with the procedures required in federal courts. Rather, *Dice* merely recognizes that substantive state law and its selective and discriminatory application cannot hinder the statutory purposes of the FELA. In this case, unlike the litigant in *Dice*, Jackson enjoyed a five-day jury trial of all issues under the substantive FELA law. Louisiana's procedural law uniformly afforded Jackson a jury trial of his FELA claim and appellate review as in any civil suit, and he does not allege that the state courts improperly administered their procedures.

Jackson further wrongly relies on *Hetzel v. Prince William County*, 118 S. Ct. 1210, 1211-12 (1998), for its holding that a federal court of appeals in granting a remittitur must permit the plaintiff the option of a new trial in the district court before requiring the district court to enter judgment for the lesser amount. The *Hetzel* decision is obviously distinguishable because it applied the Seventh Amendment guarantee of the right to a jury trial in a proceeding in federal court. In contrast, this suit, which Jackson filed by choice in a Louisiana state court, does not involve the Seventh Amendment. There is simply no constitutional right to a jury trial in the state courts. Moreover, because *Hetzel* is a Title VII case, it does not implicate the statutory requirements of the FELA. *Hetzel* is completely inapposite.

Furthermore, Louisiana's procedures of appellate review of jury verdicts do not violate the Seventh Amendment or the substantive law of the FELA. Although federal substantive law applies in an FELA action filed in state court, state procedural rules govern the case. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 357 (1988);

St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409, 411 (1985). Each state can decide how to structure its judicial system, and the right of review in an appellate court is purely a matter of state concern. *See Johnson v. Fankell*, 117 S. Ct. 1800, 1805 (1997) (citing *Kohl v. Lehlback*, 160 U.S. 293, 299 (1895)). In fact, "due process does not independently require that the State provide a right to appeal." *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996). Thus, Jackson was not constitutionally entitled to any sort of appellate review of the jury verdict in his favor, much less a particular procedure of review. The Louisiana Fourth Circuit Court of Appeal's review of the verdict and increase of the damage award according to Louisiana constitutional and statutory requirements for appellate review actually provided Jackson more protection than the federal constitutional and statutory requirements on which he attempts to rely.

Article 5, § 10(B) of the Louisiana Constitution of 1974 provides that "appellate jurisdiction of a court of appeal extends to law and facts." Article 2164 of the Louisiana Code of Civil Procedure implements this provision by providing that "[t]he appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." The review of facts and law has been part of the Louisiana appeals process since 1816. Note, *Civil Procedure—Remand—Right to a Jury Trial*, 41 Tul. L. Rev. 922, 922 (1967). In fact, Louisiana appellate courts have a constitutional duty to review quesitons of fact as well as questions of law, and to enter judgment accordingly where the record is otherwise complete. *Ragas v. Argonaut Southwest Ins. Co.*, 388 So. 2d 707 (La. 1980); *Gonzales v. Xerox Corp.*, 320 So. 2d 163 (La. 1975). The Eastern District of Louisiana confronted this issue and decided—and the United States Supreme Court affirmed—that Louisiana's system is constitutional and that the Seventh Amendment has no applicability in the Louisiana state courts. *Melancon v. McKeithen*, 345 F. Supp. 1025, 1027-28, 1045-48 (E.D. La.

1972) (Wisdom, J.), *aff'd sub nom. Mayes v. Ellis*, 409 U.S. 943 (1972) (mem.), *aff'd sub nom. Hill v. McKeithen*, 409 U.S. 943 (1972) (mem.), *aff'd sub nom. Davis v. Edwards*, 409 U.S. 1098 (1973) (mem.). Louisiana's appellate courts may properly reexamine jury fact findings in civil cases. *Id.* There is no reason to disturb this long-standing legal principle in this case.

Moreover, in his writ petition to this Court, Jackson has misstated the Louisiana procedures of appellate review of jury verdicts. In exercising their constitutional powers to review the factual findings of trial judges and juries, the Louisiana appellate courts are constrained by the "manifest error" rule, whereby the reviewing court gives great weight to the factual conclusions of the trier of fact and does not disturb reasonable evaluations of credibility and inferences of fact. *Canter v. Koehring Co.*, 283 So. 2d 716, 724 (La. 1973). In the absence of a finding of manifest error, the appellate court cannot merely "disagree" with the jury on factual issues and substitute its own judgment or views for those of the trier of fact. *Sistler v. Liberty Mut. Ins. Co.*, 558 So. 2d 1106, 1114 (La. 1990).

In cases where manifest error occurs or some prejudicial error of law taints the jury's factual findings, however, the Louisiana appellate court is not required to remand the case for a new trial, but should make an independent review and determination of the facts from the complete record. *McLean v. Hunter*, 495 So. 2d 1298, 1301 (La. 1986). Here, the Louisiana court of appeal found no reversible error of law in the trial of Jackson's case.

Contrary to Jackson's repeated assertions throughout his petition for certiorari, the Louisiana appellate court did not review the jury's award "*de novo*" and grant an "additur." Rather, the court of appeal applied a far different and distinct scope of review—the "abuse of discretion" standard—in examining the quantum of the damage award. *See Arceneaux v. Domingue*, 365 So. 2d 1330,

1333 n.1 (La. 1978). Under that procedure, only after analyzing the facts and determining that they disclose an abuse of discretion may the reviewing court consider an award as being either insufficient or excessive for articulated reasons. *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257, 1260-61 (La. 1993), *cert. denied*, 510 U.S. 1114 (1994); *Reck v. Stevens*, 373 So. 2d 498, 501 (La. 1979). The Louisiana court of appeal may then modify the award, but only to the extent of raising an inadequate award to the lowest point (or lowering an excessive award to the highest point) that is reasonable based on the record. *Youn v. Maritime Overseas Corp.*, 623 So. 2d at 1260-61. As the Louisiana Supreme Court has long held, "It is never appropriate for a Court of Appeal, having found that the trial court abused its discretion, simply to decide what it considers an appropriate award on the basis of the evidence." *Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 (La. 1976).

In this case, applying these state procedures of appellate review that respect the jury's discretion, the Louisiana Fourth Circuit Court of Appeal increased Jackson's award to what it considered the lowest reasonable amount. It did not enter the award *de novo*. It likewise did not enter an "additur," which is an entirely different procedure under Article 1814 of the Louisiana Code of Civil Procedure, whereby the trial judge reforms the verdict with the consent of a party as an alternative to a new trial on damages only.

Under the settled principle that state procedural law applies to an FELA case filed in state court, Louisiana's procedures of appellate review governed the appeal of the jury award in this case. This result is consistent with this Court's decision in *Bombolis*, cited above, which recognizes that state courts apply the FELA according to their prevailing "modes of procedure." 241 U.S. at 218. *See also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712 (1986) ("[S]tate courts are not required to apply

Rule 52(a)—a rule of *federal* civil procedure—to their own appellate system for reviewing factual determinations of trial courts.").

Here, like any other civil litigant in the Louisiana court system, Jackson enjoyed a jury trial on the merits of his FELA claim. The district court correctly adopted the verdict and refused to grant a JNOV, new trial, or additur under state procedures that Jackson asked the court to apply. Applying state procedures of appellate review, the Louisiana appellate court increased the jury's damage verdict but otherwise affirmed its findings of liability and apportionment of fault. Although CSX disagrees with the increase of the judgment on appeal, in no event did the Louisiana courts contravene the Seventh Amendment, which does not even apply in this case. Jackson is not entitled to a remand for a new trial on damages or any other issue.

CONCLUSION

This case does not merit a grant of certiorari. William Jackson failed to raise his alleged federal question involving the Seventh Amendment at the earliest opportunity for seeking review of the jury's award in the Louisiana district court and sought relief totally inconsistent with the arguments that he now raises in his petition for certiorari. Under these circumstances, Jackson has waived any right to now assert that the Seventh Amendment prohibited the state appellate court from amending the jury's verdict.

Furthermore, the Seventh Amendment does not apply to FELA cases tried in state courts, which are entitled to apply their own procedural law. Appellate review of the jury verdict in this case under Louisiana's procedures did not violate the Seventh Amendment or the substantive law of the FELA.

For the foregoing reasons, respondent, CSX Transportation, Inc., respectfully asks this Court to deny William Jackson's petition for a writ of certiorari.

Respectfully submitted,

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